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No. 99-1347

Supreme Court, U.S.
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# In the Supreme Court of the United States

CAL-ALMOND, INC., FRAZIER NUT FARMS, INC., BAL NUT, INC., CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, ROTTEVEEL ORCHARDS, THERON SHAMGOCHIAN INC., BEARDS QUALITY NUT CO., AMARETTO ORCHARDS, AND CARLSON FARMS,

*Petitioners,*

*v.*

UNITED STATES DEPARTMENT OF AGRICULTURE,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

As petitioners explained in their opening brief, the challenged almond marketing order — under which the government selects a message for private industry members and imposes financial penalties on members who refuse to convey that message — is irreconcilable with the First Amendment's protected "marketplace of ideas." See Pet. 17-21. It violates the fundamental premise that, under our Constitution, "the speaker and the audience, not the government, assess the value" of commercial speech. *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). It violates the principle that "official scrutiny of the content of [speech] as the basis for imposing a tax is entirely incompatible with the First Amendment * * *." *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987). And because the program is set up to benefit a single, dominant industry member at the expense of its competitors, it violates the premise that a majority may not harness the government's power to force a minority to fund its message. See *Board of Regents of Univ. of Wisconsin* v. *Southworth*, 120 S. Ct. 1346, 1357 (2000).

The government virtually ignores these arguments, claiming that *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), gives it a blank check for mandatory advertising. Br. in Opp. 8-10, 13-14. But its assertion that *Wileman* permits virtually unlimited restrictions on commercial speech, so long as they are imposed indirectly through content-based taxes rather than directly through speech bans, merely highlights the need for this Court's review. Equally in conflict with this Court's decisions, and equally deserving of its review, is the government's contention that the First Amendment permits a biased decisionmaker to impose financial penalties on the basis of the content of one's speech, so long as one is permitted an eventual right of review. The government's attempts to defeat review on procedural and prudential grounds are insubstantial.

1. The basic premise of the government's argument is that if *Wileman* permits it to require *all* industry members to contribute to an advertising program, then it must also permit a "more flexible" program under which only *some* industry members — those who have not conveyed the government's chosen message in their own advertisements — are required to contribute (or to contribute more). Br. in Opp. I. The government deems the almond marketing order's content-based assessments to be "more accommodating of the interests of objecting participants" than the advertising program at issue in *Wileman*, because the almond marketing order offers handlers a choice between speaking the approved message themselves and funding the Almond Board's expression of that message. *Id.* at 8, 10-11.

If the government's analysis were correct, then its undisputed authority to tax newspapers and magazines would also permit it to tax just those newspapers and magazines that refused to print pro-government articles. Cf. *Arkansas Writers' Project*, 481 U.S. at 229-232. After all, a content-based tax on publications would permit editors the "flexibility" to choose between printing pro-government articles and paying the tax. Each editor would be "free * * * to refrain from engaging in [pro-government] speech" — although each dissenting editor would, as here, be subject to the results of that choice, mandatory payment of "the full amount of its assessment." Br. in Opp. 11. In the context of free speech, the greater power does *not* imply the lesser: narrower, content-based restrictions are more dangerous than broad, neutral restrictions.

Notably, the only support the government cites for its radical position is the holding in *Wileman*. Br. in Opp. 9-10, 13-14. Yet the government fails to explain how the reasoning of that decision supports it, given *Wileman*'s express recognition that heightened scrutiny applies to marketing orders that "impose [a] restraint on the freedom of any producer to communicate any message to any audience" or that "compel any person to engage

in any actual or symbolic speech." 521 U.S. at 469-470. The almond marketing order limits an almond handler's freedom to communicate the advertising message of its choice by attaching financial consequences to its selection of a particular message. See Pet. 17-24. Almond handlers whose advertisements convey the government's chosen message are charged lower assessments than almond handlers whose advertisements contain their own, unapproved message. An almond handlers is thus compelled to advertise the government's message, on penalty of a higher assessment.

The government blithely asserts (at Br. in Opp. 10-11, 13 n.4) that the almond market order "imposes no restriction whatsoever on the commercial speech in which handlers may engage" because a "handler is free under the almond marketing order to communicate any message that it chooses" and to "refrain from engaging in any speech whatsoever." In so arguing, however, it ignores the "significant burden on expressive activity" imposed by the marketing order's financial incentives and disincentives. *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 468-469 (1995); see also *American Communications Ass'n* v. *Douds*, 339 US. 382, 402 (1950) ("indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes"). As we explained in our opening brief, and as this Court has repeatedly held, the use of content-based financial incentives to regulate speech is every bit as constitutionally offensive as are content-based bans. See Pet. 18-20 (collecting cases). The government does not cite or discuss a single one of these cases, and nothing in *Wileman*, on which the government erroneously relies, contradicts or limits the principle that content-based financial penalties on speech warrant heightened scrutiny.

The government improperly relies on Justice Souter's dissenting opinion in *Wileman* as support for its argument that the almond marketing order must be constitutional. Br. in Opp.

10, 14 n.5. In dissent, Justice Souter noted that, "*[o]n its face,* at least, a credit system would be a far less restrictive and more precise way to achieve" the government's purported interest in increasing demand for California peaches, plums, and nectarines. 521 U.S. at 502 (emphasis added). And we do not contest that, *on its face*, the credit system described in 7 U.S.C. § 608c(6)(I) — under which an almond marketing order "may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising" — could satisfy constitutional scrutiny. But here, the regulations impose additional, content-based limitations on what advertising is creditable, the purpose and effect of which, as the Ninth Circuit noted, is "to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers." *Cal-Almond, Inc.* v. *U.S. Dep't of Agric.*, 14 F.3d 429, 440 (9th Cir. 1993); see also Pet. 10-12.[1]

2. Notably, the government makes no attempt to defend the almond marketing program under *Central Hudson Gas &*

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[1] Under both pre-1994 and current regulations, for example, an almond receives credit for advertising a product containing almonds only if that product displays the handler's brand or, under the current regulations, the words "California Almonds." See 7 C.F.R. § 981.441(c)(3)(iv)(C) (1992); 7 C.F.R. § 981.441(e)(iii)-(iv) (1994). Yet most almond handlers other than Blue Diamond sell their almonds to food manufacturers rather than to retail customers; California almonds constitute well over 99% of all almonds consumed domestically; and Blue Diamond supplies approximately 90% of the domestic retail market. See Pet. App. 158a, 165a-213a, 217a; ALMOND BOARD OF CALIFORNIA, ALMOND ALMANAC 20 (1999); U.S. Dep't of Agric., Foreign Agricultural Service, "Almond Situation and Outlook," <http://www.fas.usda.gov/htp2/circular/1997/97-10/almonds.htm>. Accordingly, public awareness of a specific handler's "brand," or of the "California Almonds" brand, is of no value to handlers other than Blue Diamond. Because food manufacturers are reluctant to incur the trouble and expense of changing their labels to include the almond handler's brand name or "California Almonds," however, these requirements create an additional obstacle to receiving credit.

*Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), effectively conceding that the "challenged regulations do not even come close to satisfying" the heightened level of scrutiny applied to restrictions on commercial speech. See Pet. 20-21. Cf. Br. in Opp. at 13-14. Nor could it. The ALJ's findings in this regard were crystal clear: the government's interest in furthering demand for almonds is not furthered by the challenged advertising program because the "essential purpose" of that program is not to engage in generic advertising and promotion for the benefit of the almond industry but instead to further the interests of the dominant producer, Blue Diamond. See Pet. 20-21.

3. The government also contests (Br. in Opp. 12) our assertion that the almond marketing order vests effective control over the program in the hands of a biased decisionmaker — a single, dominant industry member, Blue Diamond. According to the government, the rules requiring a seven-member majority to make any changes in the almond marketing order effectively prevent Blue Diamond from taking control. *Ibid.* "More importantly," the government claims, the existence of a right of appeal to the Secretary of Agriculture cures any constitutional defect in delegating authority to a biased decisionmaker. *Ibid.*

These arguments fall far short of the mark. The supermajority requirement on which the government relies applies only to *changes in the almond marketing order itself.* This is irrelevant to our constitutional argument, which has to do with allowing a biased decisionmaker to *administer* an order under which it reviews the content of its competitors' speech and imposes financial assessments based on that review. See Pet. 24-25. The government does not dispute that Blue Diamond controls administration of the order.

Moreover, since it is petitioners who seek to change the marketing order (and Blue Diamond who benefits from its current shape), the supermajority requirement for changes in the

marketing order only serves to *consolidate* Blue Diamond's power — not to check it. As the ALJ found, and as the government concedes by its silence, the almond marketing order has the purpose and effect of benefitting Blue Diamond at the expense of its competitors. See Pet. 10-12; see also *Cal-Almond*, 14 F.3d at 440 ("[T]here seems to be no logical justification for [the restrictions on creditability imposed by the pre-1993 regulations] other than * * * to benefit Blue Diamond * * * at the expense of smaller handlers * * *."). The supermajority requirement ensures that Blue Diamond, which is guaranteed four seats on the ten-member Board as the dominant cooperative producer, see Pet. 5 n.1, maintains veto power over any proposed changes.

Nor are these constitutional defects cured because aggrieved handlers have a right to appeal to the Secretary. Cf. Br. in Opp. 12. First, aggrieved handlers have no appeal of right; any appeal is wholly within the Secretary's discretion. See 7 C.F.R. § 981.441(f) (1994). Second, the right to appeal an adverse decision to the Secretary, which cannot even be pursued until an aggrieved handler has first exhausted two levels of administrative appeal to the Board, does not satisfy the First Amendment requirement of a "reasonably prompt decision by an impartial decisionmaker." *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 307-308 (1986). Under the government's theory, any and all defects in the administrative process of the order — however blatantly unconstitutional — would be exempt from constitutional review, since everything is subject (theoretically) to the Secretary's discretionary oversight.

4. In addition to defending the substance of the decision below, the government argues that our petition for certiorari should be denied because (i) this Court has already considered the substantive issues it presents and has decided that they do not warrant further review; and (ii) the case "implicates no issue

of general significance." Br. in Opp. 14-16. Neither contention is correct.

a. The government claims that this Court's decision (two days after issuance of the decision in *Wileman*) to grant the petition in *United States Department of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879, vacate the Ninth Circuit's decision in that case, and remand for further consideration in light of *Wileman* ("GVR"), suggests "that the Court understood that the constitutionality of the almond marketing order, including its credit mechanism, is governed by *Wileman Brothers*, not *Central Hudson*." Br. in Opp. 14-15. With all respect, one would think that the Solicitor General would have a more accurate understanding of the meaning of a GVR order.

As the Court explained in *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964), a GVR order "d[oes] not amount to a final determination on the merits." *Id.* at 777. To the contrary, the Court issues a GVR order because it has *not* conducted plenary review, and has *not* concluded that reversal is warranted. *Id.* at 776; see also, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 174 (1996) ("[I]t is precisely because we are uncertain, without undertaking plenary analysis, of the legal impact of a new development * * * that we GVR."). A GVR order is appropriate whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167-168; accord *Lords Landing Village Condominium Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997). A "reasonable probability" that an intervening decision "may" change the outcome is not, as the government implies, a reversal on the merits. See, *e.g.*, *Graham* v. *Collins*, 506 U.S. 461 (1993) (granting certiorari in a case that had earlier been GVRed).

The government also claims that our petition should be denied because it raises the same issues as the petition for certiorari in *Cal-Almond, Inc.* v. *United States Department of Agriculture*, No. 97-1935, which was denied by this Court. 525 U.S. 818 (1998). Just two years ago, however, the government argued that the petition in No. 97-1935 should be denied because the pre-1993 almond marketing order had been amended and "the constitutionality of the revised regulation [wa]s not at issue"; accordingly, the government claimed, the constitutionality of the pre-1993 regulations was an issue of "no continuing importance." U.S. Brief in Opposition at 14-15, *Cal-Almond, Inc.* v. *U.S. Dep't of Agric.*, No. 97-1935 (filed July 1998). Here, in contrast, Cal-Almond challenges both pre-1993 and *current* versions of the almond marketing order — and thus the government's argument in the earlier case is inapplicable.

Moreover, the government ignores the interlocutory posture of the earlier petition. As Justice Scalia noted in his opinion regarding the denial of certiorari in *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) — and as that case aptly demonstrates — denial of a petition at an interlocutory stage does not "preclude [a party] from raising the same issues in a later petition, after final judgment has been rendered." *Id.* at 946 (collecting cases); *United States* v. *Virginia*, 516 U.S. 910 (1995) (granting subsequent petition for a writ of certiorari).

b. The government's claim that our challenge to the almond marketing order "implicates no issue of general significance" (Br. in Opp. 16) is erroneous. Although the government asserts (without cited support) that "no credit mechanism is in effect (or has been in effect in recent years) for any other commodity," it concedes that credit programs are authorized by the governing statute and regulations for commodities such as olives, hazelnuts, filberts, and raisins. See Pet. 25-26. Any one or more of these programs could be implemented, and a challenge to each of them would be governed by the Ninth Circuit's decision below.

More fundamentally, the decision below warrants further review regardless of its impact on other credit-based advertising programs. The decision below resolved a question of federal constitutional law in a manner that conflicts with this Court's prior decisions. Cf. SUPREME COURT RULE 10(c). The challenged marketing order imposes substantial financial burdens (on the order of $8.5 million annually) on a sizable group of handlers (100 or more). See Pet. 4. These real-world consequences are at least as significant as the effects of the challenged decision in other First Amendment cases in which this Court has granted review. *E.g.*, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995); *City of Dallas* v. *Stanglin*, 490 U.S. 19 (1989); *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984); *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Cohen* v. *California*, 403 U.S. 15 (1971).

Finally, any doubt about the importance of this case is eliminated by the government's own brief and the sweeping interpretation of *Wileman* on which it relies. As we have explained (at pages 2-3, *supra*), the government's reading of *Wileman*, which was accepted by the court below, would permit it virtually unlimited power to compel or restrict commercial speech. Under the government's expansive interpretation, *Wileman* marked a sharp turn away from this Court's prior First Amendment jurisprudence and, at least in the context of commercial speech, abrogated or overruled dozens of cases. As we explained in our Petition, the disagreement between Cal-Almond and the government over the proper scope of the *Wileman* holding mirrors the widespread confusion among the lower courts and commentators about the decision. See Pet. 26-27. The government is simply wrong in declaring that the issues presented here lack "general significance."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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